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**East Village Grand Sichuan Inc. d/b/a Grand Sichuan Restaurant and Chinese Staff & Workers Association.** Case 02–CA–143468

November 30, 2016

**DECISION AND ORDER**

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA  
AND MCFERRAN

On January 14, 2016, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions with supporting argument, and the General Counsel filed an answering brief. The General Counsel filed limited cross-exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions,<sup>2</sup> to amend the remedy, and to

<sup>1</sup> The Respondent implicitly excepts to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We affirm the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by discharging employee Fang Xiao. In doing so, we reject the Respondent's argument that Xiao did not engage in concerted activity within the meaning of Sec. 7 of the Act. There is ample evidence that, starting in 2012, Xiao engaged in numerous concerted discussions with her coworkers concerning the Respondent's terms and conditions of employment. Because Xiao's November 2014 Federal lawsuit alleging violations of Federal and State labor laws logically grew out of these discussions, we find that it constituted concerted activity. See, e.g., *Salisbury Hotel*, 283 NLRB 685, 687 (1987); *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038–1039 (1992), after remand 310 NLRB 831 (1993), enfd. 53 F.3d 261 (9th Cir. 1995). Member Miscimarra does not reach or pass on the finding that the lawsuit itself constituted concerted activity. In finding that Xiao engaged in concerted activity, we do not rely on *U Ocean Palace Pavilion, Inc.*, 345 NLRB 1162 (2005), a decision cited by the judge, which involved expressly joint activity. Finally, in finding animus in this case, we would find it unnecessary to rely on Sister Gao's statement that she would "fight to the end," which as the judge acknowledges falls within Sec. 8(c) of the Act, given the other strong evidence of animus in this case. Like the judge, Chairman Pearce would rely on Sister Gao's statement that the Fuzhouhous employees are united, want to sue the restaurant, and Gao would "fight to the end" as evidence of animus.

In addition, we do not rely on *Teamsters Local 25*, 358 NLRB 54 (2012), a decision cited by the judge. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014).

adopt the recommended Order as modified and set forth in full below.<sup>3</sup>

**ORDER**

The National Labor Relations Board orders that the Respondent, East Village Grand Sichuan Inc. d/b/a Grand Sichuan Restaurant, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for engaging in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Fang Xiao full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Fang Xiao whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Fang Xiao for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 2 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Fang Xiao, and within 3 days thereafter notify

<sup>3</sup> In accordance with our recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), we shall order the Respondent to compensate Xiao for her search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). For the reasons stated in his separate opinion in *King Soopers*, 364 NLRB No. 93, slip op. at 9–16, Member Miscimarra would adhere to the Board's former approach, treating search-for-work and interim employment expenses as an offset against interim earnings.

In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall also modify the judge's recommended tax compensation and Social Security reporting remedy.

We shall modify the judge's recommended Order to reflect these remedial changes, to conform to the Board's standard remedial language, and in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall also substitute a new notice to conform to the Order as modified.

her in writing that this has been done and that the discharge will not be used against her in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2, 2015.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 30, 2016

\_\_\_\_\_  
Mark Gaston Pearce, Chairman

\_\_\_\_\_  
Philip A. Miscimarra Member

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

\_\_\_\_\_  
Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX

### NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Fang Xiao full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Fang Xiao whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Fang Xiao for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Fang Xiao, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

EAST VILLAGE GRAND SICHUAN INC. D/B/A  
GRAND SICHUAN RESTAURANT

The Board's decision can be found at [www.nlrb.gov/case/02-CA-143468](http://www.nlrb.gov/case/02-CA-143468) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



*Joane Si Ian Wong, Esq.*, for the General Counsel.  
*Curt Donald Schmidt, Esq. (Law Office of Thomas D. Gearon)*, of Flushing, New York, for the Respondent.  
*Margaret E. McIntyre, Esq.*, of New York, New York, for the Union.

## DECISION

## STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge filed by Chinese Staff & Workers Association (Union) on December 23, 2014, a complaint was issued against East Village Grand Sichuan Inc. d/b/a/ Grand Sichuan Restaurant (Respondent) on August 31, 2015.

The complaint alleges that the Respondent discharged its employee Fang Xiao because she engaged in protected concerted activity by filing a civil action against the Respondent in U.S. District Court which alleged violations of the Fair Labor Standards Act and the New York Labor Law.<sup>1</sup>

The Respondent's answer denied the material allegations of the complaint and a hearing was held before me in New York, New York, on November 9, 10, 12, and 30, 2015.

On the entire record,<sup>2</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

<sup>1</sup> The complaint also alleged that the Respondent unlawfully discharged employee Chang Hui Lin. However, on October 19, 2015, the charge alleging his discharge was withdrawn and the complaint's allegations concerning his discharge were dismissed. Accordingly, Lin's discharge is not before me.

<sup>2</sup> The General Counsel's unopposed motion to correct the transcript is granted and received in evidence as GC Exh. 22. During the hearing, the Respondent made a motion to dismiss the complaint and for summary judgment. The motions are hereby denied.

## FINDINGS OF FACT

## I. JURISDICTION

The Respondent, a corporation having its place of business at 19-23 St. Marks Place, New York, New York, is engaged in the operation of a public restaurant serving and delivering food and beverages to individual customers. The Respondent's answer denied that it was engaged in interstate commerce. However, during the hearing, it agreed to a stipulation entered into in a prior case involving these parties.<sup>3</sup> That stipulation stated that "annually, the Respondent purchases and receives at its New York facility, products, goods, and materials valued in excess of \$5000 directly from points located outside New York State."

In addition, the Respondent's U.S. income tax return for the period June 1, 2013, to May 31, 2014, stated that its gross sales were \$1,223,279. Thus, the Respondent meets the Board's standards for the assertion of jurisdiction, and I accordingly find and conclude that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## I. THE FACTS

*A. Xiao's Discussions with her Coworkers*

Fang Xiao began work for the Respondent in August 2008. She worked as a "busboy" throughout her employment. Her duties included preparing tea, clearing dirty dishes from the tables, refilling customers' water glasses and cleaning the bathroom. Her coworkers included three waiters/waitresses and three busboys. Tips received by the wait staff and the busboys were combined at the end of each day. Busboys earned one-half the amount of the tips that the waiters earned.

Xiao is a native of Fuzhou, China, whose residents speak Fuzhounese, which is apparently spoken exclusively by those residents. Her fellow employees who spoke Fuzhounese were Xing Duan Jiang, Chang Hui Lin, and Xue Qin Tang.<sup>4</sup>

Xiao took coffeebreaks from work once or twice per week with coworkers Ah Ying, Min Fu, Xing Duan Jiang, Chang Hui Lin, and Xue Qin Tang. During those breaks, which took place after lunch when they left the restaurant for coffee, they spoke about their working conditions including the Respondent's failure to pay them the minimum wage and for overtime work, their long work hours, and the requirement that they purchase their work uniforms.

Their discussions culminated in a lawsuit filed against the Respondent in U.S. District Court in November 2012, by Xiao's coworkers Xing Duan Jiang, Chang Hui Lin, and Xue Qin Tang, and four others. It alleged that the employees were not paid proper wages under the New York Labor Law or the Fair Labor Standards Act. (FLSA).

Xiao did not join the lawsuit because she intended to travel to China and because she began work at a friend's restaurant.

<sup>3</sup> East Village Grand Sichuan, Inc., d/b/a Grand Sichuan, JD(NY)-81-3.

<sup>4</sup> A "name chart," GC Exh. 11, lists the English name, Chinese name, and nickname for persons mentioned at the hearing. I have used the English name of each person since that was the name the witnesses used. Nicknames were also used at the hearing.

She told the plaintiffs that she had no time to become involved in the action. Xiao visited China from March 2012 to April 2012.

After her return from China, Xiao worked at a different restaurant and then left New York to work at her friend's restaurant. She stopped work there in late 2012. In early 2013, Xiao returned to New York. The Respondent's admitted supervisory manager, Tian Sheng Wang, called and asked her to return to work at the Employer's restaurant. She worked for the Respondent from early 2013 through May 2014.

Xiao gave uncontradicted testimony that Manager Wang, who did not testify, spoke to her about five times concerning employees Xing Duan Jiang, Chang Hui Lin, and Xue Qin Tang, her Fuzhounese coworkers who were the plaintiffs in the 2012 Federal lawsuit.

In their first conversation, Wang told her that the three were not "personable people. They work at the restaurant at this time but they are also suing the restaurant at the same time. . . . They are part of the worker union; so no hanging out with them." Xiao replied that Wang should not bother them.

Xiao continued to take her breaks with the three employees identified by Wang, and that practice continued until she was discharged in May 2014.

Later, in March or April 2013, Wang told Xiao that the three employees wanted to work at the restaurant but at the same time were suing the company and attempting to receive some benefits. Xiao responded by saying that they were "fighting" to obtain the "minimum wage" which is "normal and fair." Wang angrily replied, "if you analyze this or be like this, the Boss will not like it." Xiao continued taking breaks with those workers.

In August 2013, Wang directed Xiao not to "hanging out with them. If you continue hanging out with them, the Boss will not like you." Xiao asked him why she should not meet with them because they are "doing what they are doing and I'm doing my own thing. We just hanging out." Wang angrily told her "I don't care, and if you continue like this, the Boss will not like you and he's kind of upset . . . don't listen or don't hang out with them."

In November 2013, Wang asked Xiao in an angry manner "why you don't listen to me? Why you keep hanging out with them? You continue hanging out with them. Boss will not like you." Xiao replied that they were doing "our own thing. We don't bother each other. Why the boss don't like us just going out to have coffee?" Wang responded, "you don't listen so I don't care about you. You just like to hang out with them."

Their last conversation concerning her coworkers occurred in February, 2014. Wang, speaking in an angry, very strong voice, asked Xiao "why you going out with them, hanging out with them? Why don't you listen to me? The Boss don't like you going out with them." Xiao replied that they were "suing the restaurant for the minimum wage and I can do that. Why you don't like me going out with them?" Wang replied, "if you continue going out with them, the

Boss will not like you, and I'm not going to care about you anymore." Xiao replied that she would not care about him either.

During the time that Wang warned Xiao not to associate with her three coworkers, she nevertheless continued to meet with

the three Federal court plaintiffs during their breaks.

In about February or March 2014, Xiao spoke to coworker and busboy Ah Ying about two or three times concerning the need to receive a greater portion of the tips. At about that time, Manager Wang was replaced by admitted statutory supervisor Wen Yan Gao, called "Sister Gao."

In late March or April, 2014, Xiao told Sister Gao that she has been working at the restaurant a long time, and asked if she would "increase the tips." Gao told her that she had to speak with Xiao Tu Zhang, known as "Boss Zhang." A few days later, Gao told Xiao that Boss Zhang denied her request.

#### *B. Xiao's Workplace Injury*

At the end of the shift on May 28, 2014, as was the practice, all the tips received by the waiters and busboys were combined. The waiters received a full share of the tips and the busboys a half share. The money was then distributed to the workers. Yan Hua Li, also known as Qi Qi, gave Xiao her money. Xiao immediately protested that she did not receive the correct amount of her share. Qi Qi slapped the table, saying that she would not pay her more than she had. Xiao said that Qi Qi "cannot do that to me." Qi Qi said she was and that she did not care.

Qi Qi told Sister Gao that Xiao should not receive more money than she received because she was lazy. Sister Gao told her that Xiao helped her and she should be paid what she was entitled to. Qi Qi then spat at Xiao who spat at her in return. Qi Qi then grabbed Xiao's hair and punched her head. Xiao fell to the floor. Xiao's husband came and called the police.

Xiao went to the hospital where she received a "return to work statement" which stated that she may return to work without restrictions 1 month later, on June 29.

Boss Zhang visited Xiao at her home on June 1. He asked what happened and when told that Xiao did not cause the altercation, said that Sister Gao would investigate. Zhang told her to "just get rest. I hope you can go to work." He told her to keep her medical records, but that he would pay her. Xiao stated that she was not paid by the Respondent for the time she did not work after her injury or for her medical expenses.

On June 21, Zhang called Xiao and was told that she continued to have headaches. Zhang told her to rest and "don't rush to return to work." In late July, Zhang called again and asked where she was. Xiao told him that "I was at the China Town, the worker union." Zhang said that he would call her again, but did not. Xiao testified that the Union helped her file the charge in this case, and also assisted workers in filing their minimum wage and other lawsuits.

#### *C. The Physician's Notes*

Xiao stated that in June and July she had intermittent pain, dizziness and headaches. She filed a claim for workers compensation and on July 7, 2014, visited physician Dr. Frantz Jasmin who wrote a note which stated that she was being treated for (a) postconcussion (b) neck pain and (c) pain in both shoulders. The note stated that she was currently "disabled as a worker until re-evaluation in 4 weeks." Xiao gave the note to employee Min Fu to present to Sister Gao. Min Fu testified that he did so.

One month later, on August 4, Dr. Jasmin wrote that Xiao

was seen for “both shoulders, neck and head injuries” and was disabled from work for 4 weeks. Xiao gave this note to Sister Gao a day or two later. Sister Gao appeared unhappy at receiving the note.

Xiao stated that during September, she experienced headaches, dizziness, and shoulder pain. She visited Dr. Jasmin that month. His September 3 note was identical to the July 14 note and also indicated that she was disabled from work for four weeks. Xiao gave the note to Sister Gao.

On October 1, Dr. Jasmin wrote that Xiao was being treated for headaches and shoulder pain, and was disabled from work for 4 weeks. She gave the note to Sister Gao who, at hearing, admitted receiving it.

Xiao testified that when she gave the notes to Sister Gao, she did not ask to return to work because she did not know when she would be able to return to work or when she would be fully recovered. Therefore, she could not tell Sister Gao when she would return to work.

Xiao conceded that in November 2014, Dr. Jasmin told her that he could not say that she could “fully” return to work, but that she could “try to work.” He did not give her a note that month or in December that she was disabled from work.

Xiao testified that she did not return to work for the Respondent in November or December because she was not fully recovered, and was not certain that she was capable of working on a full-time basis as she had in the past. She reasoned that she preferred not to return to work for the Respondent only to find that she was capable of working only one or two days and then having to give an excuse for not being able to work.

However, in November, Xiao applied for work as a busboy at four restaurants. At three of the restaurants she agreed to start work on a specific day. However, when that day arrived, she felt dizzy, had headaches and believed that she could not work. She did not report to work. She worked one day at the fourth restaurant, located in Connecticut. The following day she experienced headaches and did not return to work. Although she was asked to return again to try to work at some of those restaurants, she did not.

Notwithstanding that she tried to work at four restaurants in November 2014, Xiao did not communicate with the Respondent in November or December in an effort to return to work, or for any other reason.

Xiao stated that, in December 2014, she told Dr. Jasmin that she was always feeling dizzy. Another physician recommended an injection of some type or physical therapy.

#### *D. Xiao Files a Federal Lawsuit*

In August 2014, Xiao spoke to coworkers Min Fu, Chang Hui Lin, Ah Ying, and Fu Xiao about joining her in filing a lawsuit against the Respondent for its failure to pay them the minimum wage. She urged them to become “united together to sue the restaurant.” She told them that they had been working for the Respondent for a long time at long hours and have not been treated very well. She spoke to Ah Ying two or three times about the need to sue the Respondent.

On November 13, 2014, Xiao filed a complaint against the Respondent in U.S. District Court alleging violations of the Fair Labor Standards Act and the New York State Labor Law in its

failure to pay her the minimum wage, pay for overtime work, and withholding tip money.

After she filed the suit she again asked Min Fu several times and she also asked Ah Ying, Min Fu and Chang Hui Lin to join the suit. She told Min Fu that a lawsuit was necessary to require the Respondent to pay the minimum wage, and to stop it from requiring them to purchase their own uniforms. She urged, “why don’t we put together to the Boss?” Min Fu corroborated Xiao’s statement that she asked him five or six times to join her lawsuit, saying that the Respondent did not treat them fairly, urging him to “join together to sue.” On August 11, 2015, Min Fu filed his own lawsuit against the Respondent alleging the same violations as those set forth in Xiao’s complaint.

Ah Ying and Min Fu told Xiao that they were undecided about joining her lawsuit, but Chang Hui Lin agreed. On April 30, 2015, Xiao’s complaint was amended to include Chang Hui Lin.

#### *E. Xiao Attempts to Return to Work with the Respondent*

Min Fu began work in September 2013, and quit in May, 2014. He returned to work 1 month later. He testified that in July 2014, Sister Gao told him that Xiao had no illness and was just “acting out.” She also told him that the “Fuzhounese speakers, they are united, they want to sue the restaurant to make money.”

Min Fu further testified that in September, 2014, following the discharge of employee Dayong Chen, he heard Sister Gao say that “all Fuzhounese, they are united, and Dayong Chen will sue me.”

After Chang Hui Lin was fired in October, 2014, Min Fu heard Sister Gao say that “all the Fuzhounese, they want to sue the restaurant, sue the boss to make the money.” Min Fu recalled that after employee Xue Qin Tang stopped work in late October 2014, Sister Gao said that Xue Qin Tang would sue her. She further said that she (Gao) would not take the same course of action as Boss Zhang by paying the employees. Rather, she will “fight to the end.”

On January 2, 2015, Xiao entered the Respondent’s restaurant with Chang Hui Lin, and asked cashier Phoebe to see Sister Gao. Phoebe said that she was in the kitchen and asked her to wait. Xiao stated that Sister Gao exited the kitchen and approached her with a “very mad face.” Xiao asked her “can you arrange what time for me to return to work?”

Sister Gao replied, “you coming back to work? You suing the Boss? You suing the restaurant, and now you want coming back to the restaurant to work? This is not right. Go look for your lawyer. You want to come back to work?” Xiao concluded that Sister Gao “not allow me back to work.”

Min Fu was present during this exchange, and testified in detail about the confrontation. He stated that he was standing near the restaurant’s door and greeted Xiao as she entered. He saw Sister Gao leave the kitchen and tell Xiao “you sued the restaurant and now you want to come back to work.” He corroborated Xiao’s version of her exchange with Sister Gao, adding that Sister Gao spoke in a very loud, high pitched voice.

#### *Analysis and Discussion*

The complaint alleges that the Respondent discharged Xiao because she engaged in protected concerted activity by filing a

civil action against the Respondent in U.S. District Court which alleged violations of the Fair Labor Standards Act and the New York Labor Law.

The question of whether the Respondent unlawfully discharged Xiao is governed by *Wright Line*, 251 NLRB 1083, 1084 (1980). Under that test, the General Counsel must prove by a preponderance of the evidence that animus toward Xiao's concerted activity was a substantial or motivating factor in the decision to discharge her. The General Counsel must show that Xiao engaged in concerted activity, employer knowledge of such activity, and animus toward such conduct by the Respondent.

Once the General Counsel has made the requisite showing, the burden then shifts to the Respondent to prove, as an affirmative defense, that it would have discharged Xiao even in the absence of her concerted activity.

To establish this affirmative defense "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have been taken even in the absence of the protected activity." *L. B. & B. Associates, Inc.*, 346 NLRB 1025, 1026 (2006). "The issue is, thus, not simply whether the employer 'could have' disciplined the employee, but whether it 'would have' done so, regardless of [her protected] activities." *Carpenter Technology Corp.*, 346 NLRB 766, 773 (2006).

#### The General Counsel's Case

Xiao engaged in concerted activities by conversing with her fellow, Fuzhounese-speaking coworkers once or twice per week concerning their working conditions. Three of those coworkers filed a Federal lawsuit thereafter in 2012 alleging as violations the very same matters they spoke about during their breaks.

Xiao also asked Sister Gao if the tips could be increased. Her request was concerted because it addressed the wage concerns of other employees." *Salisbury Hotel*, 283 NLRB 685, 686-687 (1987). Her request reflected the complaints of other workers that their tips were unlawfully inadequate. In fact, the Federal lawsuit alleged that they were not paid their proper tips.

Further, employees' "discussion of wages is protected concerted activity because wages are a 'vital term and condition of employment,' probably the most critical element in employment and the grist on which concerted activity feeds." *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enf. denied in part 81 F.3d 209 (D.C. Cir. 1996).

In addition, Xiao's filing of the Federal lawsuit alleging improper wage payments constitutes protected, concerted activity. *U Ocean Palace Pavilion, Inc.*, 345 NLRB 1162, 1170 (2005).

Prior to the filing of her lawsuit, Xiao spoke to fellow workers about their need to join together to sue the Respondent for its failure to pay the minimum wage.

he Respondent's knowledge of her conversations with her fellow workers is clearly established in manager Wang's warnings to her in 2013 that she should not "hang out" with the three plaintiffs because they were suing the restaurant and were part of the workers union. He told her the Boss would not like her to associate with them, would not like her for doing so, and that

he would not care about her. Despite the warnings that she stay away from those employees she told Wang that she would continue to take breaks with them and that he should not bother them. Her insistence that she would disobey his order to disassociate with them made it clear that she was in league with them in their attempts to remedy the alleged improper workplace issues they faced.

Similarly, the Respondent's knowledge that she brought a lawsuit against the Respondent, and its animus toward her for doing so is established in Sister Gao's angry refusal to permit her to return to work, saying that she sued the restaurant and now wants to work for it? Gao's adding that "this is not right" demonstrates Sister Gao's animus toward her because she filed the lawsuit.

Respondent's animus toward Xiao and her Fuzhounese coworkers is also amply demonstrated by Sister Gao's telling Min Fu that the Fuzhounese speakers are united and want to sue the restaurant, and that she would "fight to the end." Of course, as the Respondent argues, there is nothing unlawful in the Respondent's desire to defend the lawsuits against it. However, its discharge of Xiao for suing the restaurant violates the Act.

Xiao gave uncontradicted testimony about her visit to the Respondent's premises on January 2, 2015, at which she asked Sister Gao what time she could return to work. Gao sarcastically replied that Xiao is suing the Boss and the restaurant and wants to return to work, adding "this is not right," advising that she "look for your lawyer."

I credit Xiao's interpretation that this exchange constituted her discharge. She understood that she could no longer work at the restaurant. She stated that Gao did not allow her to return to work. No words of art are necessary to establish a discharge. Indeed, the Respondent's answer admitted that it discharged Xiao.

Based on the record evidence, I find that the General Counsel has proven that the Respondent was motivated in discharging Fang Xiao by her filing the Federal lawsuit alleging that it failed to lawfully compensate her. *Wright Line*, above.

#### The Respondent's Case

The Respondent's answer to the complaint admits that it discharged Xiao on January 2. However, no evidence was adduced as to why it discharged her. Gao, the Respondent's witness, did not contradict or deny Xiao's testimony that when she appeared for work she was simply told that she sued the restaurant and expected to be rehired?

The Respondent changed its position, arguing in its brief that it did not discharge Xiao. Rather, it argues that it not have to do so because she abandoned her position. Shifting of positions is evidence of unlawful motivation. *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999) (shifting reasons constitute evidence of discriminatory motivation); *Black Entertainment Television*, 324 NLRB 1161 (1997) (Board noted Respondent's shifting explanations given in its position statement and its assertions at the hearing for reducing hours and laying off of employees. "The Board has long expressed the view that when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted," *Sound One Corp.*, 317

NLRB 854, 858 (1995); *Mastercraft Casket Co.*, 289 NLRB 1414, 1420 (1988), *enfd.* 881 F.2d 542 (8th Cir. 1989). I infer that the reasons given for discharging Xiao, including her alleged abandonment of her job, are not the true reasons for the Respondent's refusal to add her to the work schedule.

The Employer further argues that, even assuming that it fired Xiao, it did so lawfully because she did not appear to work for 60 days from the time, in November, 2014, that her physician did not provide a statement of disability.

Sister Gao testified that after receiving Dr. Jasmin's notes that Xiao was disabled for each month she did not take any action concerning them. Rather, she simply noted that she "has excuse from work." She did not know when she would return to work, but she expected, thought and hoped that she would hear from Xiao at the expiration of the 4 weeks noted in the documents.

Certainly, Sister Gao said nothing to Xiao on January 2 concerning her alleged abandonment of her job. She did not tell her that she had been absent from work for too long a period of time. Nor could she have done so since Xiao was absent from work for about one year, from March, 2012 to early 2013 due to a trip to China and her work in another restaurant. No complaint was made to her about being away from work for so long, and there was no evidence that she was in contact with the Respondent during that period of time. In fact, Manager Wang called her in early 2013 and asked her to return to work, which she did. Further, there was no evidence that the Respondent had a policy or any standards concerning the amount of time a worker could be absent from work. Accordingly, the Respondent's defense that Xiao abandoned her job or that it would have fired her for her absence has no merit.

Further, it appears that the Respondent was anxious to have Xiao return to work until it was told she was seeking the help of the union and until it received the lawsuit she filed. Thus, Boss Zhang Wang visited her at home in June after her injury. Later that month, he told her to rest. When Xiao told him in July that she was at the union's premises, he said he would call her again but did not. Further, Gao testified that when she received the physician's notes she hoped that she would return to work.

That friendly attitude changed when Xiao filed the lawsuit in November 2014. When she attempted to return to work 4 or 5 months later, she was discharged.

The Respondent argues that Xiao's failure to advise the Respondent that she wanted to return to work, following the advice from her physician in November 2014 that she should try to work, establishes that she abandoned her job. Xiao admittedly did not communicate with and had no contact with any of the Respondent's managers from the time that Dr. Jasmin suggested in early November that she try to work, until January 2, 2015, when she asked to return.

According to the Respondent, Xiao's failure to tell the Respondent during that period of time that she was no longer disabled, that she claimed to continue to be disabled, that she was not seeking employment elsewhere, or that she had not abandoned her job with the Employer, established that she intended to abandon her job.

The Respondent asserts that following its receipt of physi-

cians' notes in May and July through October 2014 that she continued to be disabled from work, it "continued to hold her job available." However, when Xiao failed to provide similar notices of disability in November and December, when it did not hear from Xiao, it concluded that she was no longer interested in resuming work at the restaurant.

The Respondent asserts that it should not have to "hold open indefinitely" Xiao's position when she did not "fulfill her obligations to the restaurant" by notifying it of her continued disability or her interest in returning to work during the months of November and December.

It therefore follows, argues the Respondent, that it was entitled to conclude that Xiao abandoned her job when she did not provide a physician's notice of disability in November or December 2014 as she had in the past, and had also not sought to return to her job or communicate with the Respondent.

The Board has held that "in order to establish abandonment of employment . . . an employer must present 'unequivocal evidence of intent to permanently sever [the striker's] employment relationship . . .'" *L. B. & B. Associates, Inc.*, 346 NLRB 1025, 1029 (2006). The Respondent has made no showing that Xiao unequivocally intended to permanently sever her employment relationship with the Employer.

In fact, during the course of her treatment for her injury, Xiao timely presented physicians' notes of her disability to the Respondent. Her only lapse was in the months of November and December which was due to the fact that she received none in those months. She then asked for her job in January. However, Xiao was not notified during that time that she was discharged or that she had been replaced. Further, as set forth above, Xiao was absent from work for nearly 1 year and was asked, by the Respondent, to return to work after that lengthy absence.

Moreover, the Respondent argues that Xiao's actions in seeking work at four other restaurants in November 2014, establish her intent to abandon her job with the Respondent.

The fact that Xiao sought other employment does not prove that she abandoned her job. She stated that she tried to work pursuant to Dr. Jasmin's advice but found that she was unable to do so. Her explanation was understandable that she sought work in jobs where she could stop work without difficulty. She credibly reasoned that if she returned to work full time at the Respondent and found that she was unable to work she would have to make an excuse for not being able to work.

Accordingly, I cannot find that Xiao abandoned her job with the Respondent. I also find and conclude that the Respondent has not met its burden of proving that it would have discharged Fang Xiao even in the absence of her protected, concerted activities. *Wright Line*, above.

#### CONCLUSIONS OF LAW

1. The Respondent, East Village Grand Sichuan Inc. d/b/a Grand Sichuan Restaurant, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by discharging its employee Fang Xiao.

3. The unfair labor practices set forth above are unfair labor

practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged and refused to reinstate Fang Xiao, it must offer her reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges she would have enjoyed absent the discrimination against her. Further, I shall recommend that the Respondent make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accord with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), my recommended Order also requires the Respondent to (1) submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Xiao, it will be allocated to the appropriate calendar quarters, and/or (2) reimburse her for any additional Federal and State income taxes she may be assessed as a consequence of receiving a lump-sum backpay award covering more than 1 calendar year.

In accordance with the Board's decision in *J. Piccini Flooring*, 356 NLRB 11, 13–15 (2010), I shall recommend that the Respondent be required to distribute the attached notice to members and employees electronically, if it is customary for the Respondent to communicate with employees and members in that manner. Also in accordance with that decision, the question as to whether a particular type of electronic notice is appropriate should be resolved at the compliance stage. *Id.* at 13–14. See *Teamsters Local 25*, 358 NLRB 54 (2012).

The General Counsel asks that I recommend that Xiao be awarded reimbursement of expenses incurred while she sought interim employment. Inasmuch as the Board has not awarded such a remedy, I shall not do so here.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>5</sup>

#### ORDER

The Respondent, East Village Grand Sichuan Inc. d/b/a Grand Sichuan Restaurant, New York, NY, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Discharging employees because of their concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Fang Xiao full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Fang Xiao whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Fang Xiao in writing that this has been done and that the discharge will not be used against her in any way.

(d) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix." <sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 13, 2014.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 14, 2016

<sup>5</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>6</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the national Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."



## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge you because of your protected, concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Fang Xiao full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL within 14 days of the date of the Board's Order, make Fang Xiao whole for any loss of earnings and other benefits suffered as a result of the discrimination against her.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge, and within 3 days thereafter notify Fang Xiao in writing that this has been done and that the discharge will not be used against her in any way.

EAST VILLAGE GRAND SICHUAN INC. D/B/A GRAND  
SICHUAN RESTAURANT

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/02-CA-143468](http://www.nlr.gov/case/02-CA-143468) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

